Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1979

No. 79-406

THE ESTATE OF NOLVERT P. SCOTT, JR.,
Individually and on behalf of all
other persons similarly situated,
*Petitioner,*

*v.*

THE UNIVERSITY OF DELAWARE, *et al.*
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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**THE ESTATE OF NOLVERT P. SCOTT, JR.,**
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*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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*To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The petitioner, The Estate of Nolvert P. Scott, Jr., individually and on behalf of the class it represents, prays that a writ of certiorari issue to review and reverse the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 6, 1979.

## OPINIONS BELOW.

The opinion of the United States District court for the District of Delaware by The Honorable Walter K.

Stapleton certifying the class is reported at 68 F.R.D. 606 (D.Del. Sept. 11, 1975) (Appendix A). The opinion on the motion to decertify the class is unreported officially, but may be found at 16 F.E.P. Cases 737 (D.Del. Sept. 14, 1976) (Appendix B). The decision of the United States District Court on the merits is reported at 455 F.Supp. 1102 (D.Del. Aug. 16, 1978) (Appendix C).

The opinion of the United States Court of Appeals for the Third Circuit is not yet reported officially, but may be found at 19 F.E.P. Cases 1730 (3d Cir. June 6, 1979)(Appendix D). The judgment in the United States Court of Appeals for the Third Circuit was entered on June 6, 1979. (Appendix I) A petition for a rehearing was denied on July 3, 1979. (Appendix J)

## JURISDICTION.

The petition for a rehearing was denied on July 3, 1979. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED.

1. Has the court of appeals misconstrued Dr. Scott's burden in its finding that he failed to make out a prima facie case of intentional race discrimination?

2. Was the propriety of the class certification properly before the court of appeals in view of the fact that the University did not take a cross-appeal and did not raise the issue of class certification until the time of the filing of its answering brief?

3. Does a non-renewed university sociology professor have such an inherent conflict with a class of faculty members which includes prospective applicants that the certification of such a class constitutes an abuse of discretion?



## STATUTES AND RULES INVOLVED.

This case involved Rules 4(a) and 10(b) of the Federal Rules of Appellate Procedure and Rule 23 of the Federal Rules of Civil Procedure.

It also involves 28 U.S.C. §2106 and 42 U.S.C.§§1981, 1983 and 2000e et seq. The above-stated rules and statutes are found in Appendix K.

## STATEMENT.

On September 11, 1975, the District Court certified this suit as a class action. (Appendix F) Jurisdiction was based on 28 U.S.C. §1343. The court found that the plaintiff, who was allegedly a victim of discriminatory working conditions and contract termination, was "seeking to represent all blacks who have been or in the future will be, discriminated against with respect to a number of employment practices." (A4) After the University had essentially completed its discovery, it filed a motion to decertify the class. At that time the deposition of Nolvert Scott had been taken and the plaintiff had answered a substantial set of interrogatories. (Docket Entries, Ct. of Appeals Appendix 3-5a). The court on September 16, 1976, refused to decertify the class. (Appendix G). Trial began on April 4, 1977.

### Dr. Scott's Individual Claim

University regulations require that a professor whose contract is up for renewal be judged using the general criteria of scholarship, teaching, and service. Each department also is required to weight each of these criteria and to specify in writing the types of evidence that will be used in the evaluation of each of the three general criteria. The members of a department vote on the renewals and their recommendation is sent to the administration. Toward the end of the second year of petitioner's three-year contract, in

May of 1973, he was non-renewed because his performance in teaching and scholarship allegedly was substandard. Dr. Scott continued working until June, 1974.

The evidence is undisputed that the renewal vote of the sociology department violated University and departmental regulations. Scholarship, teaching and service were not weighted. (In fact, little credit was given Dr. Scott for service). Furthermore, student evaluations, not designated as evidence for evaluating "teaching", were used to Dr. Scott's detriment. (Testimony of Chairman Scarpitti, Ct. of Appeals Appendix, 502-504a) The record also reflects that he was the first black hired in the sociology department and this was only after prodding by the University president. He then was the first person ever non-renewed by that department. Dr. Scott was referred to as "window dressing" by one of the members of the department. He additionally was the subject of racial hate mail by students and he was falsely accused of and investigated for public drunkenness on campus, yet no administrative action was taken to determine who his accusers were or to reprimand them.

Drs. Alfred McClung Lee and James Blackwell, experts in higher education, testified that the evaluation of Dr. Scott was unreliable. Dr. Lee also said that Dr. Scott was a qualified teacher. Dr. Magoon, the faculty moderator of the student government's teacher evaluations, recounted that the student evaluations were unreliable and that Scott's teaching was found adequate by him in a controlled study which he performed.

The performance of Dr. Scott was compared to that of Drs. Nohara, of the sociology department, who was renewed in 1970; Kepka of the educational foundations department, who was renewed in 1973 and 1974; Black of the English department, who was renewed in 1971 and 1973; and Reddington, who was renewed in 1969. The performance of all these professors was comparable to or worse than Dr. Scott.



It was admitted by the sociology department chairman that Nohara in 1970 was judged inadequate in teaching, scholarship, and research. The district court acknowledged that Black, Reddington and Kepka "were given significantly greater opportunities for re-evaluation" and were renewed despite comparable or poorer performance records than Dr. Scott.

Dr. Scott also relied in his prima facie case upon a wealth of evidence showing the University's historical and present mistreatment of blacks (See pp 5-6, *infra)* (For a complete record with transcript references for all the above see pp 21-30 of the Brief of Appellant in the court of appeals).

The district court held that Dr. Scott had not established a "prima facie case." (A74) It minimized or ignored most of the evidence and ruled that Dr. Scott was not *comparable* to Nohara because he was *hired* in 1965 when scholarship was not emphasized. It also ruled that Reddington, Kepka and Black were "simply different" because they were from different University departments. The court of appeals concurred and held that Scott had not made out a *prima facie* case. (A75)

**The Class Claim**

In support of plaintiff's class-wide prima class facie case, there was introduced into the record evidence demonstrating that the University's employment practices excluded blacks by law until 1950. The record reflects that even after *Parker v. University of Delaware,* 75 A.2d 225 (Del.Ch. 1950), when then Vice Chancellor Seitz held that the University of Delaware was discriminating in admissions against black students, and *Brown v. Board of Education,* 347 U.S. 483 (1954), the University in 1965 still had no black faculty members or administrators and only a handful of black students on campus. Even as late as 1971, there were only .6% blacks on the faculty. At the time of

trial, there were 1.47% blacks as faculty (12 out of 818), 3.3% as undergraduates and 1.8% as graduate students. Of 65 part-time faculty, there were no blacks in 1976.

The record identifies 55 black applicants since 1972. At least 11 of them were rejected, allegedly because they lacked certain degree requirements. Of the 100 hires immediately before trial, only one or two were black. Plaintiff also introduced expert testimony and documentary evidence of how the hiring process tended to perpetuate the almost all-white faculty.

Non-statistical expert testimony by Drs. Blackwell and Lee demonstrated how poorly the University of Delaware has done in eradicating race discrimination when compared to eighteen other states. As compared to the ten states found to discriminate against blacks in higher education in *Adams v. Richardson*, 356 F.Supp. 92 aff'd and modified, 480 F.2d 1159 (D.C.Cir. 1973) (en banc), the University of Delaware compared poorly in the number of black faculty members on the staff, last in the number of tenured faculty, and last in the number of graduate students (For a complete record with transcript references, see pp 2-21 of the Brief of Appellant in the court of appeals).

Despite all this evidence the district court held that plaintiff had not demonstrated prima facie evidence of intentional (§1983) or non-purposeful (§1981) race discrimination. The court then held that even though plaintiff had made out a case of race discrimination pursuant to 42 U.S.C. §2000e, defendants had rebutted the prima facie showing.

An appeal was taken by the plaintiff and he identified the issues on appeal pursuant to Rule 10(b) of the Federal Rules of Appellate Procedure. The question of the class certification was not an issue identified by either party. Furthermore, defendants did not cross-appeal. The defendants did urge in their answering brief on appeal that the judgment below should be affirmed "because the class



should never have been certified." At oral argument in the court of appeals the question of class certification was raised. However, the court, upon realizing there had been no cross-appeal, discontinued questioning concerning the propriety of the class. The majority opinion of the court of appeals held that the issue of whether or not the class certification was proper or not could be entertained even though there was no cross-appeal and that in its opinion there had been an abuse of discretion in certifying the class. The court stated that Nolvert Scott's interests were "necessarily in conflict with those of applicants for positions on the University faculty" because he held a "Doctor of Philosophy degree when he assumed his position" and he received a premium over the salary normally paid by the University to new Ph.D's. Dr. Scott had taught for eight years prior to receiving his Ph.D in 1971. The court also stated that Dr. Scott conceded he was not discriminated against in hiring.

Dr. Scott was only qualified to teach in sociology, one of 41 departments in the University. Since there were only ten members in the department and there is no evidence that it was planning to hire anyone, except to replace Dr. Scott, any conflict he would have with potential University applicants would have to be *de minimus*. Dr. Scott disagrees with the finding of the court of appeals that he does not "claim that he was discriminated against by the University's hiring policies." (A83) Testimony was introduced that he was considered "window dressing." Furthermore, he has complained throughout that he was only considered a token black. Although Dr. Scott himself was hired, he never conceded that he suffered no ill effects from the discriminatory hiring policies at the University. Dr. Scott also objects to the finding of the court of appeals that he asserted the Ph.D in his own favor in seeking relief on his individual disparate treatment claim. There is no record support for this conclusion.

The court of appeals decision created for the first time two subclasses, a subclass of faculty applicants and a second subclass of faculty employees. The court concluded that Nolvert Scott was not an adequate representative of the applicant class and that there was insufficient numerosity for the faculty subclass. Judge Adams concurred with the judgment of the court in a separate opinion stating that (1) a cross-appeal should never be necessary in this kind of case and (2) in his view the court is not retrenching from *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3rd Cir. 1975) cert. denied 421 U.S. 1011 (1975). The court then remanded the case to the district court with "instructions that an order be entered decertifying the class action claims." (A89)

## REASONS FOR GRANTING THE WRIT.

### I. The Court of Appeals Has Applied an Erroneous Standard of Proof for Establishing a Prima Facie Case in the Context of a Higher Education Suit.

This court has attempted to ennunciate the kind of evidence necessary to establish prima facie intentional race discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, (1978); *Board of Trustees v. Sweeney*, U.S. , 58 L.Ed.2d 216 (1978). There has never been any suggestion that a prima facie case is limited to a certain schema. In fact, in *McDonnell Douglas Corp. v. Green, supra*, at 802, ftn. 13, a hiring case, this court specifically held that there could be models of discrimination other than that suggested in *Green*. In the instant case, where Dr. Scott was terminated by the failure of the University to renew his contract, the court of appeals limited itself to the *McDonnell Douglas Corp. v. Green*



model and held that there was no prima facie showing of race discrimination.

Dr. Scott demonstrated in support of his prima facie showing that: (1) he is black, (2) he was non-renewed despite his qualifications (see *McDonnell Douglas Corp. v. Green, supra.)*, (3) he was the subject of overt racial slurs made to him by faculty and students, (4) there were procedural irregularities in the handling of his renewal (see *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 267 (1977)), (5) the voting process was subjective with an opportunity to discriminate (see *Castaneda v. Partida*, 430 U.S. 482, 497 (1977)), (6) there is a history of race discrimination at the University (see *Castaneda v. Partida, supra*, at 495, *Furnco Construction Corp. v. Waters, supra*, at 580, *Teamsters v. United States*, 431 U.S. 324, 339 (1977)), and (7) as compared to one faculty member in his department and three other members in similar departments, he was disciplined more severely than other similarly-situated non-blacks (see *McDonald v. Santa Fe Trail Transp. Co., supra.* at 283, ftn. 11). Considering "the totality of the relevant facts", *Washington v. Davis*, 426 U.S. 229, 242 (1976) the court of appeals misconstrued the prima facie burden of Dr. Scott. He at least made out such a case. The opinion below then is in conflict with all this Court's cases dealing with the extent and kind of evidence necessary to show prima facie race discrimination. For this reason the petition should be granted.

### II. The Opinion of the Court of Appeals for the Third Circuit Allowing the Review of the Class Certification Without a Cross-Appeal Is in Direct Conflict with *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479 (1976).

In *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479 (1976), this court confirmed the "inveterate and certain" rule of *Morley Construction Co. v. Maryland Casualty*

*Co.*, 300 U.S. 185, 191 (1937), that a cross-appeal must be taken by the appellee when he wishes to lessen the rights of his adversary, but a cross-appeal need not be taken when he merely wishes to urge other reasons for the affirmation of the judgment below. The court in *Massachusetts Mut. Life Ins. Co.* was applying this rule to the appellate practice of the Seventh Circuit. The court, in quoting from *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924) said:

> "It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below . . ."

This authority was brought to the attention of the Third Circuit in appellant's reply brief, but it was ignored by the court of appeals. For the Third Circuit to decertify the class, *sua sponte*,[1] without a cross appeal, was not only erroneous, but contrary to settled law.

There is also a long line of cases standing for the proposition that the Supreme Court will not entertain an issue not appealed from. See *Dandridge v. Williams*, 397 U.S. 471, 475-76 n. 6 (1970); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381, n. 4 (1970); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n. 11 (1975); *Swarb v. Lennox*, 405 U.S.

1 The University in its brief argued that the class should not have been certified, but only so in support of its argument to affirm the decision of the district court. It did not request that the class be decertified.



191, 201 (1972). In the concurring opinion by Judge Adams in this case, he acknowledged that the practice of the Third Circuit is in variance with that of the Supreme Court (A92) n. 9). This practice is squarely in conflict with the clearly enunciated doctrine of this Court and for this reason the petition should be granted.

## III. There Now Exists a Split Among the Circuits With Respect to When a Cross-Appeal is Necessary and This Court Should Resolve the Conflict.

The Scott decision is in direct conflict with *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86, 88, ftn. 2 (8th Cir. 1976). In that case the court of appeals held that an appellee cannot challenge a class certification of a truth-in-lending claim when it did not file a cross-appeal.

> "Defendant Boston Securities seeks to challenge on appeal the district court's certification of the suits as class actions on the question of liability. We need not reach this question, however, for Boston has not filed a cross-appeal. An Appellee cannot attack a judgment either to enlarge his rights thereunder or to lessen the rights of his adversary unless he files a cross-appeal. *Tiedman v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 513 F.2d 1267, 1272 (8th Cir. 1975); *Hadfield v. Ryan Equip. Co.*, 456 F.2d 1218, 1222 (8th Cir. 1972)."

A careful examination of the circuit opinions throughout the country makes it apparent that there is no uniformity among circuit courts of appeal as to when a cross-appeal is necessary and when it is not necessary. The D. C. Circuit in *Gomez v. Wilson*, 477 F.2d 411, 414 n. 10 (D.C.Cir. 1973) stated that "unappealed portions of a district court order are final" and therefore the court of appeals is "without jurisdiction to reconsider them." This decision, however, is inconsistent with *Arnold's Hofbrau, Inc. v. George Hyman*

*Construction Co., Inc.*, 480 F.2d 1145, 1150 (D.C.Cir. 1973) which says that a cross-appeal is not jurisdictional. The Second Circuit, in *Securities And Exchange Commission v. Fifth Avenue Coach Lines, Inc.*, 435 F.2d 510, 516 (2nd Cir. 1970), an opinion written by Judge Adams sitting by designation from the Third Circuit, has held that "since the SEC did not cross-appeal from Judge McLean's order, our power is limited by the doctrine expressed by Justice Cardoso's opinion in *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937)." *Morley Construction Co.* held that a court of appeals has no right to review a lower court's decision when there is no cross-appeal. The First Circuit in *Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91, 97, n. 3 (1st Cir. 1977), stated that "it is elementary that failure to file a notice of appeal precludes an appellee from attacking the judgment." The Fifth Circuit in *Chouinard v. Chouinard*, 568 F.2d 430 (5th Cir. 1978), stated that an appellee who wishes to secure an alteration or modification of judgment must cross-appeal. However, in *United States v. United States Steel Corporation*, 520 F.2d 1043, 1052 (5th Cir. 1975), cert. denied 429 U.S. 817 (1976), it held that under special circumstances a court of appeals may consider an issue even though there is no cross-appeal. The Eighth Circuit which, as a rule, refuses to consider changes of a judgment order where there has been no cross-appeal, *Joseph v. Norman's Health Club, Inc., supra.*, did, however, in *Chicago, Burlington & Quincy Railroad Company v. Ready Mixed Concrete Co.*, 487 F.2d 1263, 1268, n. 5 (8th Cir. 1973), alter a judgment in favor of appellee without a cross-appeal where at oral argument it appeared that both counsel had made an arithmatical error which became the basis of the judgment below.

There is also a line of cases, to which the Third Circuit adheres, which states that the requirement of a cross-appeal is merely a "rule of practice" which may be



disregarded in the interest of justice. *Tug Raven v. Trexler*, 419 F.2d 536, 548 (4th Cir. 1969) cert. denied 398 U.S. 938 (1970).

In short, the courts of appeals have not enunciated a consistent policy with respect to the necessity of cross appeals. This case raises the issue squarely of when a cross-appeal is necessary.

## IV. The Decision of the Court of Appeals Raises the Important Federal Question of Whether *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), Has Inherently Overruled All Those Circuit and Supreme Court Decisions Which Have Permitted a Discharged Employee to Represent Prospective Employees in a Class Action Suit.

In the instant case Nolvert Scott sought to represent a class of black faculty members, present, past and future, at the University of Delaware who had been discriminated against on the basis of race. It appeared prior to the decision of the circuit court that *Wetzel v. Liberty Mutual Insurance Company*, 508 F.2d 239 (3rd Cir. 1975), cert. denied 421 U.S. 1011 (1975), was controlling and that a district court judge had the discretion to certify a class in such a case. The court of appeals, however, distinguished *Wetzel* relying upon *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), and held that there was such a necessary conflict between a discharged faculty member and the prospective applicants of the class that it would be an abuse of discretion for a trial court to certify such a class. The rationale for distinguishing this case from *Wetzel v. Liberty Mutual* is explained in footnote 21 (A84).

> "In that case, Liberty Mutual objected to class certification on the ground that the *former employees*, 'who have voluntarily severed their employment prior to suit cannot adequately represent members of the

class who are *presently employed* by the company.' 508 F.2d at 247. (emphasis supplied). Liberty Mutual never raised, and the court apparently never considered, the issue of whether *current employees* can represent a class of *prospective employees*. Certainly the interests of the former employees in Wetzel, who had voluntarily left their employment, would not be adversely affected by potential competition from prospective employees. Scott, in contrast, would have been in sharp competition for contract renewal and tenure with applicants who might be offered faculty positions."

The court went on to say "it is doubtful after *East Texas Motor Freight* that he (Scott) can lead a class challenging hiring practices." (A86).

This is also exactly what the Fourth Circuit said in *Hill v. Western Electric Company, Inc.*, 596 F.2d 99 (4th Cir. 1979). There the court held that *East Texas Motor Freight v. Rodriguez* limits *Barnett v. W.T. Grant Company*, 518 F.2d 543 (4th Cir. 1975), which had previously held a discharged employee could represent a class including potential hires. In *Hill* the district court certified a class of blacks who were discriminated against in hiring, job assignment and promotions. Named plaintiffs were six black males and females who had all been employed by Western Electric. In light of *Rodriguez* the court of appeals held that the named plaintiffs were not adequate representatives of the class because their jobs were "so different in kind from that of people who were denied any employment that the plaintiffs may not properly maintain an action for redress of alleged discrimination in hiring." *Id.*, at 102.

The state of the law is that pre-*East Texas* decisions, such as *Johnson v. Georgia Highway Express, Inc.*, 417



F.2d 1122 (5th Cir. 1969) and *Franks v. Bowman*,[2] 424 U.S. 747 (1976), appear to allow a former employee to represent a class which includes prospective employees, while post-*East Texas* decisions do not.

It is now unclear whether or not *East Texas v. Rodriguez* has implicitly overruled *Franks*. That question should be resolved by this court.

2 In *Franks v. Bowman*, this court affirmed the judgment on behalf of a class where the intervenor, Mr. Lee, a discharged employee, was permitted to represent a class of prospective and present employees.

## V. CONCLUSION

For the foregoing reasons, this court should grant the petition for certiorari to review the judgment of the Third Circuit.

Respectfully submitted,

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Dated: September , 1979



## AFFIDAVIT OF MAILING

STATE OF DELAWARE

COUNTY OF NEW CASTLE SS.

BE IT REMEMBERED that on this day of September, 1979, before me, the Subscriber, a Notary Public for the State and County aforesaid, personally appeared , who, being duly sworn according to law, did depose and say that she mailed today, by regular mail, postage prepaid, three copies of the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, and APPENDIX, to the following attorneys:

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SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

Notary Public